

NOTICE OF APPLICATION FOR APPROVAL OF PRELIMINARY MITIGATION PLAN

Notice is hereby given that on October 10, 2003, North Snake Ground Water District and Magic Valley Ground Water District (collectively referred to as "the districts"), c/o Michael C. Creamer, Givens Pursley LLP, 601 West Bannock Street, P.O. Box 2720, Boise, Idaho 83701-2720, submitted an Application for Approval of Preliminary Mitigation Plan (plan) to the Department of Water Resources (Department). The Department will process this plan pursuant to the Department's Conjunctive Management Rules (IDAPA 37, Title 03, Chapter 11).

The members of the districts hold ground water rights for domestic, municipal, commercial and industrial uses, and for irrigation of approximately 220,000 acres located mostly north of the Snake River within Gooding, Jerome, Minidoka, Blaine and Cassia Counties. Certain of these ground water rights have priority dates junior to the priority dates of certain water rights from spring sources that discharge to the Thousand Springs Reach of the Snake River. The ground water and the springs are interconnected sources of water. The districts have proposed the mitigation plan to mitigate injury to earlier priority surface water rights that may result from depletions under later priority ground water rights.

The districts propose an average delivery of 40,000 acre-feet of replacement water to the Thousand Springs Reach each year for five (5) years, commencing in 2004. The replacement water would be supplied from rental of storage water from the Water District 01 Rental Pool, management of operational spill or tail water, conversion or idling of ground water irrigated acres, and recharge to the Eastern Snake River Plain Aquifer. During the five-year period, the districts propose flexibility to accrue credits or debits in annual delivery of up to 80,000 acre-feet. Credits could be applied to future years. If the running debit total exceeds 80,000 acre-feet, the districts propose to curtail or reduce certain ground water diversions.

The Department has not made any determinations regarding the adequacy of the proposed plan. A complete copy of the application and the proposed plan is available for review at either the Department's State Office in Boise, the Department's Regional Office in Twin Falls, or may be viewed online at the following website: www.idwr.state.id.us/. Any protest against approval of the plan must be filed with the Department of Water Resources, 1301 N. Orchard St., Boise, ID 83706, together with a protest fee of \$25 on or before November 24, 2003. The protest must include a certificate of service showing that a copy of the protest has been mailed to or served on the districts.

KARL J. DREHER
Director

RECEIVED

OCT 10 2003

**BEFORE THE DIRECTOR
OF THE IDAHO DEPARTMENT OF WATER RESOURCES** Department of Water Resources
OF THE STATE OF IDAHO

**IN THE MATTER OF THE
APPLICATION OF NORTH SNAKE
GROUND WATER DISTRICT AND
MAGIC VALLEY GROUND WATER
DISTRICT FOR APPROVAL OF A
PRELIMINARY MITIGATION PLAN**

**APPLICATION FOR APPROVAL OF
PRELIMINARY MITIGATION PLAN**

The North Snake Ground Water District ("NSGWD") and Magic Valley Ground Water District ("MVGWD"), collectively the "Applicants," being entities organized under *Idaho Code* § 42-5200, *et seq.*, hereby apply to the Director of the Idaho Department of Water Resources ("IDWR") for approval of the attached Preliminary Mitigation Plan ("Mitigation Plan"). This Mitigation Plan is being submitted pursuant to IDWR's Conjunctive Management Rules, IDAPA 37.03.11.

NAME, ADDRESS AND TELEPHONE NUMBER OF APPLICANTS:

North Snake Ground Water District
152 E. Main St.
Jerome, Idaho 83338

Attn: Mike Faulkner, Chairman
(208) 324-8995 NSGWD Office

Magic Valley Ground Water District
453 West, 900 North
Rupert, ID 83350

Attn: John Stevenson and Orlo Maughn
(208) 532-4313

NOTICE OF APPEARANCE:

Jeffrey C. Fereday, Michael C. Creamer and Deborah E. Nelson of the law firm of Givens Pursley LLP hereby enter their appearance as attorneys of record on behalf of the NSGWD and MVGWD in the above-captioned matter. All correspondence, notices or pleadings should be mailed to the address listed below:

Jeffrey C. Fereday
Michael C. Creamer
Deborah E. Nelson
Givens Pursley, LLP
601 West Bannock Street
P.O. Box 2720
Boise, Idaho 83701-2720
Telephone: (208) 388-1200
Facsimile: (208) 388-1300

SUMMARY STATEMENT OF PURPOSE

The Applicants are Ground Water Districts organized pursuant to Idaho Code § 42-5201 et seq. Applicants are submitting this Preliminary Mitigation Plan for IDWR consideration and approval to allow diversion of ground water by junior-priority ground water users who are the Applicants' members. The Applicants' members hold water rights to the use of ground water for domestic, municipal, commercial, industrial uses and for irrigation of approximately 220,000 acres in southern Idaho.

The Mitigation Plan carries forward certain actions previously undertaken by the Applicants pursuant to an Interim Stipulated Agreement entered into among the Applicants and certain surface and spring water users in 2001. The Interim Stipulated Agreement expires by its terms on December 31, 2003. The Mitigation Plan also proposes additional actions and a collaborative process intended to obtain essential information concerning the nature and extent of relationships between ground water, surface water and spring water discharges in the Thousand Springs Reach ("TSR") of the Snake River and the extent to which ground water pumping by the Districts' members may be causing material injury to senior water rights in the TSR. The Mitigation Plan proposes a process to incorporate developed information into future cooperative management actions that may be undertaken on a long-term basis to address such effects.

The Mitigation Plan sets out specific goals intended to guide the Plan's objectives and strategies. Objectives and strategies are intended to further the stated goals, to allow monitoring of results and to assist in subsequent Plan evaluation and/or adjustment.

The central component of the Mitigation Plan is providing an average of 40,000 acre-feet of replacement water to the TSR each year over the Mitigation Plan's five-year term. Replacement water will be provided through the Water District 01 Water Supply Bank as available, through management of operational spill or tail water, conversion or idling of ground water irrigated acres and ground water recharge efforts.

The Mitigation Plan proposes an accounting system that allows for the carryover of replacement water credits and not more than 80,000 acre-feet of replacement water debits. The Mitigation Plan proposes a contingency plan involving the curtailment of ground water diversions in the event the Districts' replacement water account carries a debit of 80,000 acre-feet or more.

This Mitigation Plan documents the Applicants' consideration and incorporation of mitigation plan criteria contained in Rule 43 of IDWR's Conjunctive Management Rules, IDAPA 37.03.11.043.

By submitting this Mitigation Plan, the Applicants do not concede that material injury to senior surface or spring water rights in the TSR has occurred, is occurring or has been demonstrated. Rather the Applicants submit this Mitigation Plan to provide the basis for agreement among the Applicants, IDWR and surface and spring water users within the TSR allowing for continued diversion of ground water by the Applicants' members, subject to

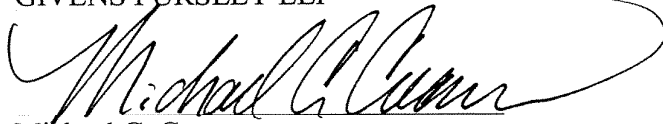
administration pursuant to the terms of the Mitigation Plan and the Conjunctive Management Rules, and as a process for resolving current uncertainties about the nature and extent of the effects of ground water withdrawals on the exercise of the senior water rights.

Mitigation Plan approval will facilitate delivery of 200,000 acre-feet of replacement water to the TSR over a five-year term, permit continued diversion and use of ground water by the Applicants' members, and avoid severe economic dislocation in the communities of southern Idaho. It also will represent an important step forward in what is hoped to be a collaborative approach to conjunctive management in the Eastern Snake Plain Aquifer and the TSR. For these reasons Mitigation Plan approval is in the public interest, will not injure or enlarge existing water rights, and is consistent with the conservation of water resources within the state of Idaho.

Numerous persons and entities have been involved with developing the goals, objectives and strategies contained in this Mitigation Plan over several years. There also are numerous persons and entities whose interests may be affected by the Plan. The Applicants believe there may be opportunities to obtain consensus on the Plan goals, objectives and strategies. At the same time the Applicants desire that a Mitigation Plan be approved and in effect by the beginning of the 2004 irrigation season. The Applicants, therefore, request that the Director provide for expedited public notice of this Preliminary Mitigation Plan, but also provide a reasonable period for interested persons to file any comments or pleadings. In the event this matter becomes a contested case, however, the Applicants hereby request an expedited hearing schedule.

Dated this 10th day of October, 2003.

GIVENS PURSLEY LLP



Michael C. Creamer

*Attorneys for North Snake Ground Water District
and Magic Valley Ground Water District*

RECEIVED

OCT 10 2003

Department of Water Resources

**PRELIMINARY MITIGATION PLAN
OF
NORTH SNAKE GROUND WATER DISTRICT
AND
MAGIC VALLEY GROUND WATER DISTRICT**

SUBMITTED BY THE NORTH SNAKE GROUND WATER DISTRICT AND THE MAGIC
VALLEY GROUND WATER DISTRICT FOR AND ON BEHALF OF THEIR MEMBERS

FOR THE PERIOD 2004-2008

DATED OCTOBER 9, 2003

TABLE OF CONTENTS

I.	Introduction: Preliminary Mitigation Plan – Overview.....	1
A.	Plan Summary.....	1
B.	Preliminary Plan Purposes.....	4
C.	Plan Scope and Duration.....	5
II.	Historical Background.....	7
A.	Brief History of Surface and Ground Water Development.....	8
1.	Natural Flow Diversions.....	8
2.	Storage Development.....	8
3.	Effects of Early Irrigation, Domestic and Stockwater Diversions on ESPA Water Balance.....	8
4.	Ground Water Development.....	9
5.	Additional Storage Development.....	9
6.	Spring Discharges in the TSR.....	10
7.	Aquaculture Development in the TSR.....	10
8.	Improved Irrigation Efficiencies.....	11
B.	Early Conjunctive Management.....	11
1.	The Swan Falls Controversy.....	11
2.	Other Controversies.....	13
3.	Department-Imposed Moratoria on New Ground Water Appropriations.....	14
4.	The <i>Musser</i> Case.....	15
C.	Recent Conjunctive Management Efforts.....	15
1.	Conjunctive Management Rules.....	15
2.	Establishment of Water Measurement Districts.....	16
3.	Establishment of Ground Water Districts.....	16
4.	SRBA Basinwide Issue 5.....	16
5.	Draft Water Management Rules.....	17
6.	Establishment of the Thousand Springs GWMA.....	18
7.	Interim Settlement Agreements.....	18
8.	Establishment of Water District 130.....	19
D.	Summary.....	20
III.	Plan Goals, Objectives, and Strategies.....	20
A.	Plan Goals.....	20
B.	Plan Objectives.....	21
C.	Plan Strategies.....	22
1.	Provide Replacement Water.....	22
2.	Improve Water Distribution.....	25
3.	Reduce Ground Water Withdrawals.....	25
4.	Develop Feasible/Effective Aquifer Recharge.....	26
5.	Minimize Unusable Operational Spill.....	26
6.	Establish Accounting System.....	26
7.	Monitoring.....	27
8.	Incorporate Adaptive Management.....	28
IV.	CONCLUSION.....	32

PRELIMINARY MITIGATION PLAN

I. Introduction: Preliminary Mitigation Plan – Overview.

This five-year Preliminary Mitigation Plan (“Plan”) is submitted by the North Snake Ground Water District (“NSGWD”) and the Magic Valley Ground Water District (“MVGWD”) (collectively, the “Districts”) to the Idaho Department of Water Resources (“Department”) for its consideration and approval pursuant to Rule 43 of the Department’s Conjunctive Management Rules, IDAPA 37.03.11.043. This Plan provides the legal and hydrologic basis for the continued diversion and beneficial use of ground water rights held by District members that otherwise might be subject to administrative curtailment based on allegations or determinations that the exercise of such ground water rights is causing material injury to senior surface or spring water rights within the Milner Dam to King Hill reach of the Snake River (hereinafter “Thousand Springs Reach” or “TSR”).

North Snake Ground Water District. 152 East Main Street, Jerome, ID 83338, (208) 324-8995. Attention: Mike Faulkner; Chairman, with copy to Michael C. Creamer and Deborah E. Nelson, Givens Pursley LLP, P.O. Box 2720, Boise, ID 83701-2720, (208) 388-1200.

The NSGWD was formed in 1996. The NSGWD currently has 336 members operating 842 wells serving domestic, stockwater, commercial, municipal and industrial uses and 98,487 acres of farmland. Appropriation priorities of the NSGWD’s members range from 1910 to 1997.

Magic Valley Ground Water District. 453 West, 900 North, Rupert, ID 83350 Attention: Bert Stevenson and Orlo Maughn, (208) 532-4313, with copy to Michael C. Creamer and Deborah E. Nelson, Givens Pursley LLP, P.O. Box 2720, Boise, ID 83701-2720, (208) 388-1200.

The MVGWD was formed in 1996. The MVGWD currently has 178 members operating 505 wells serving domestic, stockwater, commercial, municipal and industrial uses and 121,451 acres of farmland. Appropriation priorities of the MVGWD’s members range from 1948 to 1994.

The Districts are encompassed by Water District 130. The boundaries of the Districts, Water District 130, and the Thousand Springs Reach are shown in Appendix A.

A. Plan Summary.

This Plan has been developed by the Districts in response to the Department’s August 2001 Order establishing the Thousand Springs Ground Water Management Area (“Thousand Springs GWMA”) and concluding that pumping of wells within the Thousand Springs GWMA was causing material injury to spring and surface water rights in the TSR.¹ In connection with that Order, the Department determined that curtailing pumping from wells within the Thousand

¹ In the Matter of Designating the Thousand Springs Ground Water Management Area, Order (August 3, 2001).

PRELIMINARY MITIGATION PLAN

Springs GWMA with priorities junior to June 1, 1967 would provide approximately 40,000 acre-feet ("AF") to the TSR within six months.

The Districts dispute that there is a factual basis for the Department's conclusion of material injury to water rights in the TSR. The Districts do not believe that there currently is a sufficient compilation of TSR water rights and/or sufficient water measuring, reporting and administration mechanisms in place in the TSR to permit such an analysis or conclusion. While the Districts do not concede that material injury to senior surface and spring water rights has occurred or is occurring as a result of their members' water diversions, they do desire to resolve current conflicts within the water user community and propose this Plan as a reasonable and feasible step in that process.

This Plan, then, is intended to provide a basis for further collaboration and agreement among the Districts, surface and spring water right holders within the TSR, and the Department for continued diversion of ground water by the Districts' members, subject to administration pursuant to the terms of this Plan. The central component of this Plan is providing replacement water to the TSR. The Districts propose to provide an average of 40,000 acre-feet ("AF") of replacement water to the TSR during the Plan's five-year term. The Plan is "preliminary" in the sense that it is the opening document pursuant to which the Districts propose to address the issues of water supply and water management discussed herein.

The conclusions contained in the Department's Order designating the Thousand Springs GWMA were, by their terms, preliminary due to uncertainties about the accuracy of then available information. The 40,000 AF quantity was based on the best information available to the Department at that time concerning aquifer characteristics, and the nature and extent of ground water pumping effects on TSR reach gains. Until additional information about these issues becomes available, and until an appropriate analysis of whether actual material injury to senior water rights can be attributed to ground water pumping by the Districts' members, the Districts propose to limit the activities they will undertake to those stated in this five-year Plan.

The primary source of replacement water will be storage water rented by the Districts from the Upper Snake Water Rental Pool ("Rental Pool"). Analysis by the Watermaster for Water District 01 of the historical availability of storage water for rental through the Rental Pool indicates that water would be available to rent as replacement water under this Plan in normal to good water years.² Recent amendments to the Rental Pool rules should improve this availability, but this is dependent on voluntary participation by the storage spaceholders, particularly large spaceholders.³

If replacement water cannot be rented or otherwise obtained in a given year, the Districts propose to carryover a deficit up to a maximum of 80,000 AF (which they would seek to make

² Water District 1 Rental Pool (April 2003 Update), Presentation by Ron Carlson, Water District 01 Watermaster.

³ Water District 1, Rental Pool Procedures (2003).

PRELIMINARY MITIGATION PLAN

up in subsequent years of the Plan), beyond which they would implement a program to curtail ground water diversions by up to 40,000 AF of the Districts' Base Year diverted volume.

This Plan provides a historical background of surface, spring and ground water development within the Eastern Snake Plain Aquifer ("ESPA") and, in particular, within Water District 130 and the TSR. This historical background places the present hydrological and legal situation of affected water users in perspective. It also summarizes the circumstances giving rise to this Plan, the Districts' authority to prepare and implement the Plan, and the premises that form the sideboards or limits to the Districts' proposed mitigation.

Two key premises of this Plan are: 1) the ESPA/TSR hydrologic interrelationship is, on a specific level, uncertain; and 2) other water management factors present in the ESPA are likely to have as much or more effect on discharges to the TSR than either the current level of ground water withdrawals or the level of mitigation that can feasibly be provided by the Districts.

This Plan states eight goals intended to guide the Plan's objectives and strategies. This Plan incorporates an adaptive, participatory management process and encourages consensus among water users.

This Plan describes current and proposed physical programs that are intended to benefit reach gains in the TSR. It describes cooperative work necessary to evaluate the extent of injury, if any, being incurred by senior water right holders in the TSR, and identifies cooperative efforts to carry out legislative, funding, and operational strategies to improve the information base needed to better understand interrelationships between the ESPA and the TSR and to address such injury where indicated.

Intended beneficiaries of this Plan include surface and spring water users in the TSR collectively. The Districts' members also are intended beneficiaries to the extent approval and implementation of this Plan will permit continued ground water diversions under junior priority water rights. This Plan does not provide coverage for non-members of the Districts. The Districts have established internal policies and procedures by which non-members who are not currently participating in this Plan may do so.⁴

This Plan is intended to comply with requirements of Idaho law, the requirements for mitigation plans set forth in the Conjunctive Management Rules adopted by the Department (IDAPA 37.03.11 et seq.), and the policies of the Idaho Water Resource Board as adopted in the State Water Plan.

⁴ A person who is not a District member but who has a ground water right within Water District 130 and who wishes to participate in this Plan may do so by becoming a member of the appropriate District and paying all assessments in arrears from January 2001 forward.

PRELIMINARY MITIGATION PLAN

B. Preliminary Plan Purposes.

This Plan serves three purposes. First, it provides a framework for ground water users in the ESPA and water users in the TSR to continue to gather information critical to understanding what effects have occurred from ground water pumping or other factors and what feasible options exist to address these demonstrated effects. This information gathering, which must involve open and free sharing of data, will, at a minimum, include investigations about the following:

- The nature and amounts of surface, spring and ground water rights and use within Water Districts 130 and 36A and the TSR;
- The locations of all relevant water diversions for irrigation and other uses and the diversion and measurement facilities employed;
- The timing and location of the effects of ground water pumping on ground water levels and on spring and surface water sources;
- The timing and location of the effects of mitigation actions on ground water levels and on spring and surface water sources;
- The timing and location of the effects of past and future changes in surface water use on ground water levels and on spring and surface water sources; and
- The tools and information that will provide the greatest protections and certainty within the prior appropriation doctrine for the region's varied water uses.

The Department, the State of Idaho, ground water users, and surface and spring water users all need complete, accurate water right and water use data to guide these community-based efforts. This Plan assumes that such information will point to opportunities, choices and solutions that the entire water user community can support and that can be implemented within the prior appropriation doctrine.

Second, this Plan documents the participating ground water users' commitment to continue implementing physical measures during the term of this Plan that include purchasing storage or "replacement" water and enhancing ground and surface water delivery systems to optimize delivery of replacement water to the TSR. Plan participants and beneficiaries, with the Department's assistance, will monitor and analyze the results of these efforts and will work together when appropriate to modify Plan strategies to meet the stated goals and objectives on a long-term basis. This open information gathering and exchange will be important to determine the Plan's effectiveness and to implement the adaptive management approach incorporated in the Plan.

Third, this Plan is intended to use the information gathered and shared during the term of its implementation to produce a long-term agreement—whether it be in the form of a permanent

PRELIMINARY MITIGATION PLAN

or long-term mitigation plan or other vehicle, to avoid litigation, and to provide more reliable water supplies and an increased level of certainty for all water users.

To succeed, this Plan requires cooperation and funding. The Districts commit to take all available and reasonable steps to implement this Plan, to cooperate with the Department and affected water users and to fund the proposed actions during the Plan's term. The Districts propose and expect that the Department and the State of Idaho will commit to conduct and/or fund necessary studies and administration of water use in the TSR and to undertake necessary refinements to the Department's water rights and water use databases. The Districts also propose and expect that the Department and surface and spring water users will commit funds and personnel to accurately measure and report spring discharges in the TSR and actual water deliveries on a ongoing basis and will commit to active administration of these rights. This will enable the integration of information about combined use limits, subordinations, combined irrigated acreage, and reuse for both surface water rights and ground water rights.

The Districts' commitment to funding and cooperation to help address concerns about spring discharges and water deliveries in the TSR is neither a determination nor an admission about either "material injury" or required mitigation beyond this Plan's five-year term. Similarly, the Department's efforts in furtherance of this Plan or its efforts to compile and analyze accurate water right data for the Hagerman area are not determinations about "reasonableness of water diversions." Likewise, TSR water users' cooperation in implementing this Plan, through careful monitoring and administration of their water use and providing information to the Department and the Districts, is not a determination or admission about "reasonable means of diversion," "material injury," or "waste." Recognition that there are factors other than ground water pumping affecting aquifer levels and spring discharges, and efforts to understand the relative extent of those effects, are not determinations or judgments that impose obligations or liability for any particular water user or user group.

Nevertheless, interested parties should recognize that these mutual commitments can lead to a point in the near term where these issues either are resolved or made irrelevant through an active, long-term, cooperative conjunctive management program. As it is implemented, this Plan will encourage a community-based effort to address and solve water issues cooperatively without making judgments about legal rights or obligations.

C. Plan Scope and Duration.

This Plan is limited in scope and intended duration. It provides a framework for the Districts, the Department, and other water users to begin implementing effective programs to address the effects of declining spring flows on the exercise of senior water rights in the TSR as additional or more reliable information becomes available. The Districts assume that the current ground water model calibration effort, which is scheduled to be completed by December 2003, will provide an important tool to better analyze ground water pumping effects, the effects of programs proposed in this Plan, and the effectiveness of programs that might later be proposed.

PRELIMINARY MITIGATION PLAN

The ground water model now being used by the Department represents the only tool currently available to perform such analysis, and the Department's analysis concerning the effects of ground water withdrawals in Basins 36 and 37 on the TSR represents the best available information in that regard. Therefore, the objectives and strategies proposed in this Plan are limited to providing 40,000 AF of replacement water to the TSR each year averaged over the Plan's five-year term. Because the Interim Agreement between the Districts and certain surface and spring water users⁵ also has this aim, the actions undertaken by the Districts in 2002 and 2003 under the Interim Agreement form the foundation for actions proposed in this Plan. This Plan proposes to continue certain actions contained in the Interim Agreement and to complete actions not required by the Interim Agreement but already begun by the Districts.

The proposed scope of action also is limited by the significant level of uncertainty about the possible outcomes, the significant costs associated with any action likely to produce measurable effects, and the Districts' limited financial resources.

The Plan is limited in duration because the Districts believe that the expected availability of improved modeling capabilities and of accurate spring discharge and water use measurements over the ensuing five years may provide a more rapid increase in understanding to guide ESPA management than previously has been possible. Also, it is likely that the full effect of implementing various actions proposed in this Plan will not be realized within five years.

The strategies proposed by the Districts are intended to address any need to mitigate any injurious effects to spring and surface water rights within the TSR attributable to ground water pumping by the Districts' members. This Plan does not propose actions to be undertaken by the Districts to offset or mitigate the effects on the ESPA or the TSR resulting from other past, present or future events such as drought, surface water conservation efforts (e.g., conversion to sprinklers, ditch lining, reuse), or surface water storage development and allocation over which the Districts and their members have no control. The Districts contemplate, however, that efforts will be made to estimate the nature and extent of the effects of these events because the aquifer-depleting effects of such actions or events have significant potential to negate the intended beneficial effects of providing replacement water, regardless of the quantity provided.

In submitting this Plan and committing to the actions herein, the Districts do not admit or concede the extent or location of interconnections of ground water and surface water sources in the Snake River Basin within or above the TSR, nor the extent of injury, if any, to senior priority water rights as a result of ground water diversions from the ESPA under any junior priority water rights. The physical and legal relationships between the ESPA and the TSR are extremely complex. The Districts commit to participate actively in the necessary evaluation of information that will be generated over the ensuing five years of Plan implementation to develop a more permanent management strategy.

⁵ Interim Stipulated Agreement for Areas Within and Near IDWR Administrative Basin 36. Attached as Appendix B.

II. Historical Background.

The ESPA and mid- and upper-Snake River⁶ encompass a large and prolific water system. Streamflow records show that, after accounting for diversions for irrigation, the water yield from the Eastern Snake Plain area averages eight million acre-feet ("MAF") annually.⁷ On average, approximately 2 MAF of water pass below Milner Dam to the lower Snake River Basin.⁸ Reservoir storage capacity above Milner Dam is approximately 5.7 MAF, and the ESPA itself is estimated to hold from 200-300 MAF within the upper five hundred feet. The total volume of water in the aquifer may be as much as one billion acre-feet.⁹ The TSR¹⁰ is a hydrologic focal point for this water system.

The hydrology and the nature of human activities affecting the Snake River water system and the TSR are dynamic. The 2002 average annual spring discharge to the Snake River was approximately 5,440 cfs.¹¹ This is a manifestation of the accumulated effects of natural and human-induced events that have occurred over a one hundred year period and across a geographic area exceeding 15,000 square miles.

It took fifty years of infiltration and percolation of surface water from gravity irrigation across the ESPA to produce increases in TSR spring flows from a level of 4,200 cfs in 1900 to approximately 6,800 cfs by 1953. Similarly, the increased efficiencies in surface water irrigation across the ESPA over many years—and particularly since the 1970s—have, and continue to have, significant opposing effects on spring discharges. Depending on the size and duration of a given ground water withdrawal from the ESPA, it may take anywhere from less than one year to as much as one hundred years for its full effects to appear in a particular reach of the Snake River. Given the nature of the ESPA, it also is possible that a single period of above or below average precipitation can buffer, mask, or in some cases eliminate, the cumulative effects of prior events before they have propagated to the aquifer boundaries. These facts make it difficult to identify the effect on the system of any individual action or event. They also mandate that any intended adjustments to the system that might be desired likely will not have immediate or certain results.

The following discussion briefly describes the ESPA, the historical conditions and events that have affected aquifer discharges in the TSR and the premises concerning causes for declines in these discharges that form the foundation for this Plan.

⁶ The upper Snake River as used in this document means the Snake River above King Hill, Idaho.

⁷ As measured at King Hill, Idaho. Comprehensive State Water Plan ESPA (1996) (citing Kjelstrom 1992).

⁸ An average of thirteen MAF of Snake River water passes out of Idaho each year.

⁹ Comprehensive State Water Plan, ESPA at 28.

¹⁰ For purposes of this discussion and Mitigation Plan, the Thousand Springs Reach is defined to be the reach of the Snake River between Kimberly and King Hill.

¹¹ Idaho Department of Water Resources, *Preliminary Report - Average Annual Spring Discharge to Snake River Between Milner and King Hill* (1902-2003). See Appendix C.

PRELIMINARY MITIGATION PLAN

A. Brief History of Surface and Ground Water Development.

1. Natural Flow Diversions.

Development of irrigated agriculture began on the Eastern Snake Plain in the 1860s by means of direct diversions from the Snake River and its tributaries. By 1899, approximately 211,000 acres of agricultural land on either side of the Snake River above American Falls had been brought under gravity irrigation using Snake River water.¹²

2. Storage Development.

Shortly thereafter, significant additional acreage was brought under surface water irrigation with the infusion of new financial and legal support for large-scale irrigation projects. One such project was the construction of Milner Dam, which was completed in 1905. Milner Dam diverts Snake River water to large irrigation projects on both sides of the Snake River.¹³ Many of these large irrigation projects, which account for approximately 414,000 irrigated acres in the Twin Falls area, were developed under the federal Carey Act. These projects were largely completed by the early 1930s.

Coincident with these developments, the United States Bureau of Reclamation ("USBOR") began developing storage projects on the Snake River and its tributaries above Milner Dam. By 1975, federal storage projects provided 5.7 MAF of storage above Milner Dam, over 4.5 MAF of which is in Idaho reservoirs. These projects were developed to provide both primary and supplemental irrigation water to existing and newly irrigated lands.

3. Effects of Early Irrigation, Domestic and Stockwater Diversions on ESPA Water Balance.

Because a significant percentage of the irrigation water delivered to these agricultural lands percolates below the crop root zone, early irrigation development on the Eastern Snake Plain changed the water balance for both the Snake River and the ESPA. Large quantities of water that historically had passed down to the lower Snake River as spring runoff were diverted as natural flow or from storage onto the Plain, and a portion of that water became what is referred to as "incidental recharge" to the ESPA. One recent estimate is that incidental recharge accounts for 75-80 percent of the annual recharge to the ESPA or at least 4.1 MAF.¹⁴

¹² M.J. Mundorff, Ground Water in the Vicinity of American Falls Reservoir, Idaho, U.S.G.S. Water Supply Paper 1846 (1967).

¹³ Milner Dam facilitates water diversions from the Snake River to the North Side Canal, Twin Falls Canal, Milner-Low-Lift Canal and Milner-Gooding Canal.

¹⁴ Comprehensive State Water Plan ESPA at 30.

PRELIMINARY MITIGATION PLAN

This incidental recharge added an estimated 24 MAF to aquifer storage between 1890 and 1950,¹⁵ and much of it has flowed down gradient through the aquifer's various geologic media to points of discharge in the TSR. Spring discharges within the TSR increased from approximately 4,200 cfs to approximately 5,900 cfs between 1902 and 1930, and peaked at approximately 6,800 cfs in 1953.

During this same period many of the canals delivering irrigation water during the summer months also carried water during the non-irrigation season to satisfy domestic and stockwater needs of farmers and ranchers across the Eastern Snake Plain. Based on Water District 01 records, over 400,000 AF annually of Snake River surface water historically were diverted onto the Plain during the non-irrigation season. A significant portion of these diversions also became incidental recharge to the aquifer and contributed to the increases in spring discharges in the TSR.

4. Ground Water Development.

Beginning immediately after World War II, new agricultural expansion began on the Eastern Snake Plain served by development of additional surface water supplies, advances in ground water pumping technology, and available cheap power. Between 1945 and 1966, irrigated acreage throughout the Eastern Snake Plain increased from approximately 2.5 million acres to approximately 3.2 million acres, 700,000 acres of which were irrigated with ground water.

5. Additional Storage Development.

In 1945, the USBOR entered into contracts by which historical winter water diversions from the Snake River onto the Eastern Snake Plain for domestic and stockwater uses were curtailed to permit construction of Palisades Dam, which was completed in 1957.¹⁶ Operation of this program began in 1961. It was intended to, and did, improve the reliability of filling the Snake River reservoirs, including Palisades and American Falls, through forbearance of winter diversions by canal and ditch companies, who then became spaceholders of the "saved" water. The largest spaceholders under the winter water savings contracts were North Side and Twin Falls Canal Companies, who together hold contracts for 273,430 AF of space in Palisades and American Falls Reservoirs.¹⁷

¹⁵ Sally A. Goodell, Water Use on the Snake River Plain, Idaho and Eastern Oregon. U.S.G.S. Regional Aquifer System Analysis, Professional Paper 1408E at 48 (1988).

¹⁶ U.S. Bureau of Reclamation, Water Supply for Palisades Reservoir Project, Idaho: A General Plan for the Elimination of Winter Diversions, Coordinated Operation of Reservoirs and Development of New Land, Project Planning Report 1-5.17-1 at 10 (Oct. 1946).

¹⁷ 116,600 AF are in Palisades and 156,830 AF are in American Falls. The total storage in Palisades Reservoir attributable to winter water savings is 256,600 AF.

PRELIMINARY MITIGATION PLAN

Since 1961, the combined average November to March diversions for spaceholders with winter water savings contracts has declined by over 450,000 AF.¹⁸ Much of this historically would have contributed directly to ESPA recharge.¹⁹ Given the low consumptive use attributable to the historical winter water diversions, these reductions could easily have reduced aquifer recharge by more than 200,000 AF annually.

Geologic and cost considerations generally dictated that the new irrigation projects would be developed above Milner to avoid the deep Snake River Canyon and maximize the potential energy in the system for power generation and gravity delivery systems. But also key to USBOR planning was the goal to ensure as much as possible that return flows from the new projects would be tributary to the Snake River *above* Milner Dam.²⁰

6. Spring Discharges in the TSR.

Thus, by the mid-1950s to early 1960s significant changes to the surface water regime were at work that reversed the historical trend of increasing spring discharges from the ESPA to the Snake River. Since about 1953 spring discharges have been trending downward, with exceptions in wet years, and have exhibited some attenuation in peak and low discharge modulation. Concurrent with this deflection of spring discharge trends, cheap available power and encouragement by Idaho Power Company facilitated further irrigation development using ground water pumped from the ESPA. This further affected the ESPA water balance and has contributed to a limited extent to the TSR spring flow declines.

7. Aquaculture Development in the TSR.

Aquifer discharges to the TSR already had been in a declining trend for at least fifteen years when Idaho's aquaculture industry began to make significant appropriations of spring flows for year-round fish propagation use.²¹ Ground water development on the Eastern Snake Plain proceeded concurrent with this aquaculture development. Approximately half of the ground water rights of the Districts members are senior to the 1967 or later priority spring rights.²²

¹⁸ Water Delivery Records, Water District 01.

¹⁹ Some of this water likely returned directly to the Snake River as operational spill and did not contribute to aquifer recharge. Because it generally is believed that there is not a direct hydraulic connection between the ESPA and the Twin Falls South Side Tract, reductions in winter diversions by the Twin Falls Canal Company may not be reflected by changes in aquifer recharge or north-side spring discharges in the TSR. They may be reflected by changes in Snake River flows downstream.

²⁰ U.S. Bureau of Reclamation, *The Columbia River—Comprehensive Plan for the Development of the Water Resources of the Columbia River Basin* at 119 (1947).

²¹ The earliest licenses for fish propagation in the Thousand Springs area have priority dates of 1948, but most of the large aquaculture rights were developed in the 1970s.

²² Integrating administration of these mixed-priority ground water and spring rights becomes extremely complicated very quickly. Compounding this complexity is the fact that, in addition to having been appropriated

PRELIMINARY MITIGATION PLAN

These aquaculture rights account for significant volumes of water from the springs. For example, at a steady, year-round rate, it would require on the order of 483,000 AF of water just to fill the full diversion rates of water rights for the four aquaculture facilities in the TSR that as of the date of this Plan have a pending delivery call under the Conjunctive Management Rules.²³ By comparison the total diverted volume of ground water serving the approximately 219,000 acres of land within the Districts is approximately 547,000 AF.

8. Improved Irrigation Efficiencies.

The late 1970s also were a pivotal time for the Snake River water system. In June 1976, the Teton Dam collapsed while filling and released 260,000 AF of water onto the cities and farmlands of the upper Snake River Basin. The following year was one of the worst drought years on record. These events prompted extensive improvements in irrigation efficiencies across much of the lands irrigated with surface water in the upper Snake River Basin. These efficiencies have resulted in an estimated average annual reduction of on-farm water deliveries of 800,000 to 1,000,000 AF per year.²⁴

B. Early Conjunctive Management.

1. The Swan Falls Controversy.

At the same time, Idaho Power Company and its ratepayers began focusing on declining spring discharges in the TSR and the resulting lower flows in the Snake River at Idaho Power Company's Swan Falls Dam. Declining flows, the increasing number of large direct diversions from the Snake River below Milner Dam using high-lift pumps, and the Idaho Public Utilities Commission's denial in September 1976 of a certificate of public convenience and necessity for Idaho Power's proposed coal-fired power station, motivated Idaho Power to take steps to assert the priority of its hydropower rights at Swan Falls Dam. Idaho Power brought suit in state district court seeking a declaration that its Swan Falls water rights, with priorities ranging from 1901 to 1919, were not subordinated to upgradient junior water rights.²⁵ This suit was followed

near the peak of historical TSR discharges, many of the year-round aquaculture rights were examined and proved up at a time of the year when the discharges were at their highest in response to the seasonal influx of incidental recharge from surface water irrigation. Thus, an aquaculture water right, particularly one with a junior priority or a point of diversion located near the canyon rim, that originally was licensed with a 100 cfs diversion rate may have historically received the full 100 cfs only during a portion of the year. The difference between filling the full diversion rate for such rights for 365 days as opposed to filling them according to historical availability can amount to hundreds of thousands of acre-feet annually.

²³ May 15, 2003 Letter from Daniel Steenson to Department re: Demand for delivery of water right nos. 36-02659, 36-7004, 36-4032A, 36-4032B, 36-4032C, 36-2680, 36-7167, 36-7080, 36-7725, 36-7731, 36-8089, and 36-7176,

²⁴ Idaho Department of Water Resources, *Upper Snake River Basin Study* (1997). pp. 36, 41.

²⁵ Amended Complaint, *Idaho Power Co. v. State of Idaho*, No. 62237, in and for the County of Ada (filed Nov. 8, 1977).

PRELIMINARY MITIGATION PLAN

immediately by a blanket protest filed by Idaho Power with the Department against “all past and future water applications filed with the Department which contemplate diversion and consumptive use of waters from the surface and subterranean tributaries of the Snake river. . . between Milner Dam, the Snake River. . . east of Twin Falls and the Hells Canyon Dam. . . .”²⁶

The settlement of the Swan Falls litigation signed by the Governor and Idaho Power in October 1984 included several key components. Idaho Power agreed to subordinate its Swan Falls rights to all existing upgradient appropriations and to subordinate a portion of its Swan Falls rights above specified minimum flows to future upstream development. Idaho Power and the State also agreed that the State would institute a general stream adjudication to confirm the status of all existing and claimed water rights, including federal and tribal claims, in the Snake River Basin.

The settlement established a “trust water area” within which ground water generally was presumed to be tributary to the Snake River below Milner Dam and a non-trust water area where ground water was presumed to be tributary to the Snake River above Milner Dam. The legislature enacted statutes and the Water Resource Board promulgated a State Water Plan to implement the settlement, to acknowledge the public policies furthered by ground water use, and to establish criteria by which staged ground water development within the trust water area could continue.

The settlement, the statutes, and the policies all were premised on the clear understanding that ground water development would reduce aquifer discharges to the TSR, and consequently, river flows at Swan Falls. As early as 1976, the Idaho Water Resource Board State Water Plan recognized:

. . . Aquaculture is encouraged to continue to expand when and where water supplies are available and where such uses do not conflict with other public benefits. Future management and development of the Snake Plain aquifer may reduce the present flow of springs tributary to the Snake River. If that situation occurs, adequate water for aquaculture will be protected, however, aquaculture interests may need to construct different water diversion facilities than presently exist.²⁷

Despite the State’s policy to continue ground water development, one factor in the Swan Falls statutes had the potential to limit such development in the trust water area. This was a requirement that any ground water appropriation that would “significantly reduce” the water available to fill Idaho Power’s Swan Falls water rights would undergo a public interest

²⁶ *In the Matter of Applications Filed for Water Diversions for Consumptive Use on the Surface and Subterranean Tributaries of the Snake River Between Milner Dam and Hells Canyon* (Dec. 30, 1977).

²⁷ 1976 State Water Plan—Part Two at 118.

PRELIMINARY MITIGATION PLAN

evaluation.²⁸ In 1988, however, the Department analyzed the effect on Swan Falls hydropower generation of developing the full 196,000 acres of additional land in the trust water area for which applications for ground water permits were then pending. The Department estimated that this development of new irrigation using ground water would, after sixty years of pumping, reduce flows at Swan Falls Dam by approximately 243 cfs. The Department concluded:

Other factors present in a dynamic system as large as the Snake Plain aquifer will have more effect on the discharge of the Snake River than decreases caused by [196,000 acres] of new development . . . Approval of applications for permit or permits which propose the development of 196,000 acres of newly irrigated lands with water from the Snake Plain aquifer will not either individually or cumulatively cause significant reduction in the water supply available to [Idaho Power].²⁹

2. Other Controversies.

The Swan Falls agreement, however, essentially included only two signatory “parties”—the State of Idaho and Idaho Power. The agreement did not purport to resolve potential or future disputes between or among surface water users above Milner Dam, spring users in the TSR, and ground water users. In 1989, North Side and Twin Falls Canal Companies and American Falls Reservoir District filed protests with the Department objecting to all then-pending applications for permits to appropriate ground water in the non-trust water area of the ESPA (tributary to the Snake River above Milner Dam). Those protests subsequently were withdrawn, but the Department adopted new procedures for processing applications for permits in the non-trust water area.

The Department would continue to process applications to appropriate water for domestic, stockwater, commercial, industrial, municipal, and non-consumptive uses under the existing water appropriation rules. The Department also would continue to process applications to appropriate water for irrigation under existing water appropriation rules, but the Department began to condition these new permits in a way that retained the Department’s jurisdiction to incorporate the irrigation water right into a water district and to require future augmentation or mitigation of resulting depletions that injured senior water rights. The Department also began incorporating a condition in new permits providing that the permit was subject to all prior rights and did not give rise to any defense or claim against the holder of a senior right from ground or surface water sources based on theories of forfeiture, abandonment, adverse possession or estoppel.

²⁸ Idaho Code § 42-203C(1).

²⁹ Idaho Department of Water Resources, *In Re: Evaluating Whether Development of New Irrigated Acreage Will Cause a Significant Reduction in Trust Water Available for Power Production*, Memorandum Decision and Order at 4 (undated).

PRELIMINARY MITIGATION PLAN

The Department's continued processing of permit applications in the non-trust water area was premised in large part on its finding that development of irrigation on the approximately 47,000 acres covered by pending applications would decrease the annual discharge to the Snake River in the Blackfoot to Minidoka reach by only seven tenths of one percent after sixty years of pumping.³⁰ The Department determined that this level of depletion was not significant given the overall long-term stability of the streamflows entering the Snake River above Milner Dam, the vastness of the ESPA and the variability of other factors that influence recharge and discharge from the aquifer. The Department also believed that the legal relationship of ground and surface water rights would need to be determined in the Snake River Basin Adjudication ("SRBA") to permit conjunctive management of these rights.³¹

3. Department-Imposed Moratoria on New Ground Water Appropriations.

The Swan Falls Agreement and the Department's decisions regarding continued processing of pending applications for ground water development in trust and non-trust water areas did not result in further large-scale ground water development. In May 1992, following six consecutive years of drought and with little new ground water development in the interim, the Department imposed a moratorium on processing all pending and future applications to appropriate ground or surface water from the Snake River Basin above Weiser.³²

Two months later, Twin Falls Canal Company and North Side Canal Company brought suit in state district court seeking a permanent injunction prohibiting the Department from processing pending or new applications for permits to appropriate ground or surface waters in the non-trust water area. This suit was settled when the Department agreed, among other things, to undertake a five-year hydrologic study and to issue a specific moratorium order with respect to the non-trust water area. That order, issued in January 1993, imposed a moratorium on processing all pending and new applications for permit in the non-trust water area for so long as a drought emergency existed, and it limited the Department thereafter to authorizing no more than 10,000 AF of new consumptive use in any one year.³³

³⁰ Computer modeling indicated depletions in aquifer discharges to the Snake River above Milner Dam attributable to ground water pumping would approximate 6000 AF (8 cfs) at the end of fifteen years following development and 16,000 AF (22 cfs) after sixty years.

³¹ February 17, 1989 Letter from Keith Higginson, Director, Idaho Department of Water Resources to Gary Slette re: Processing Procedure – Non-Trust Water Area.

³² *In the Matter of Applications for Permit for Diversion and Use of Surface and Ground Water in the Snake River Basin Upstream from the USGS Gage on the Snake River Near Weiser*, Moratorium Order (May 15, 1992). The moratorium did not apply to applications for permit for domestic, commercial, municipal, industrial or non-consumptive uses.

³³ *In the Matter of Applications for Permit for Diversion and Use of Surface and Ground Water in the Snake River Basin Upstream from Milner Dam*, Moratorium Order (January 6, 1993).

PRELIMINARY MITIGATION PLAN

In April 1993, the Department amended its May 1992 moratorium order. This amendment extended the moratorium to all of the Eastern Snake Plain and its tributaries, including the Big Lost River and Mud Lake areas, which previously had been subject to their own moratoria orders.³⁴ The April 1993 order did not affect the non-trust water area moratorium.

4. The Musser Case.

At this same time, Alvin Musser and others who held water rights diverted from a spring discharging at the Curren Tunnel in the TSR petitioned the Department to deliver their decreed rights from the Tunnel. This delivery call essentially sought curtailment of unspecified junior ground water rights believed to be diverting from an interconnected source with Curren Tunnel. The Director responded that he was not authorized to conjunctively administer ground and surface water rights without a formal hydrologic determination that conjunctive management was appropriate or that particular junior water rights were at fault. Mr. Musser sought judicial review and the Idaho Supreme Court ruled that the Department was required by statute to “deliver” water to Musser.³⁵

C. Recent Conjunctive Management Efforts.

1. Conjunctive Management Rules.

Still without an established procedure to conjunctively administer ground and surface water rights after the *Musser* decision, the Department initiated a negotiated rulemaking that resulted in the adoption of its current Conjunctive Management Rules in October 1994.³⁶ The Conjunctive Management Rules establish a procedure to respond to a delivery call by the holder of a senior surface or ground water right against holders of junior priority ground water rights in areas within organized water districts or in areas outside organized water districts determined to have a common ground water supply. The rules also set out criteria for determining whether rights are from an area of common ground water supply, whether the exercise of a junior ground water right is causing material injury to a senior water right, and the adequacy of mitigation plans.

Only one delivery call has been made pursuant to these rules, and that matter was settled between the affected parties without applying these criteria to curtail diversions or review a proposed mitigation plan. Soon after the Conjunctive Management Rules were in place, A&B Irrigation District, which relies heavily on ground water from the ESPA, made a delivery call under the rules requesting that the Director curtail junior water rights—primarily ground water rights—until such time as the ground water levels increased in A&B Irrigation District’s wells.

³⁴ *In the Matter of Applications for Permit for Diversion and Use of Surface and Ground Water within the Eastern Snake River Area and the Boise River Drainage Area*, Amended Moratorium Order (April 30, 1993).

³⁵ *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994).

³⁶ Rules for the Conjunctive Management of Surface and Ground Water Resources, IDAPA 37.03.11.

PRELIMINARY MITIGATION PLAN

The settlement of that administrative proceeding included an agreement that ground water pumpers outside A&B Irrigation District would form districts to measure, report and manage ground water within their boundaries. Outside the established ground water districts the Department was to establish and oversee water measurement districts that would carry out this measurement function.

2. Establishment of Water Measurement Districts.

In 1995, the Idaho Legislature passed Idaho Code Sections 42-706 through 715 in response to the Department's desire to facilitate measurement functions.³⁷ The statutes authorize the Director of the Department to create Water Measurement Districts to accomplish measurement and reporting of diversions outside of established water districts. A primary concern of the legislature was to expedite the Department's ability to obtain measurement and reporting of ground water diversions within the ESPA in light of the growing concern and potential for conflict in that area. A Water Measurement District is limited to measuring and reporting diversions within its boundaries and assessing members for the costs of such work. In October 1996, the Department created the East, North, and West ESPA Water Measurement Districts within the ESPA. The measurement and reporting functions can be assumed by ground water districts in the same areas.

3. Establishment of Ground Water Districts

The 1995 legislature also passed the Ground Water District Act authorizing the establishment of Ground Water Districts.³⁸ These districts have the authority to conduct water measurement and reporting, levy assessments to cover the districts' costs, incur indebtedness in furtherance of district responsibilities, represent members in legal proceedings affecting members' water rights, and develop mitigation and recharge plans. The NSGWD, MVGWD, and four others further east were established soon thereafter.

4. SRBA Basinwide Issue 5.

Also in 1995, Governor Batt directed the Department to increase its efforts to advance progress in the SRBA. In response, that December, the Department recommended to the SRBA Court certain general provisions concerning interconnection of water rights in three test basins. The proposed provisions became known as the "conjunctive management general provisions." Several claimants objected to the recommendations and the matter became designated by the court as Basinwide Issue 5. The SRBA Court issued an order denying inclusion of the general provisions in its decree, and on appeal the Idaho Supreme Court remanded the issue to the SRBA Court "[f]or the purpose of holding an evidentiary hearing to determine whether the [proposed]

³⁷ 1995 Idaho Sess. Laws, Ch. 291.

³⁸ 1995 Idaho Sess. Laws, Ch. 290.

PRELIMINARY MITIGATION PLAN

conjunctive management general provisions . . . are necessary to define or to administer water rights efficiently. . . .”³⁹

Following the remand, in June 1998, the Department convened a meeting of interested parties to discuss options for a conjunctive management general provision that would satisfy the conditions of the Supreme Court decision and be acceptable to the parties. At a subsequent meeting, a general consensus developed among the parties for a conjunctive management general provision almost identical in form to the general provision currently being decreed for various subbasins by the SRBA Court. Nevertheless, several additional years of litigation ensued before a settlement on this language was reached. The general provision establishes which sources of water for decreed rights are to be administered conjunctively. It does not, however, specify that conjunctive management is necessary or how conjunctive management will be implemented should it be found necessary. The general provision also provides notice to holders of ground water rights that their rights are subject to administration conjunctively with surface rights from the decreed interconnected sources.

5. Draft Water Management Rules.

In addition to the Conjunctive Management Rules, the Department has proposed Water Management Rules in draft form that would have statewide applicability.⁴⁰ These rules are intended as blanket rules, of which the existing Conjunctive Management Rules would be a subset. They propose a process by which the Department would administer (i.e., curtail, reduce diversions of, or require mitigation from) junior water rights, including junior ground water rights, to prevent injury to senior ground and surface water rights. A key difference between the proposed Water Management Rules and the Conjunctive Management Rules is that administration of junior ground water rights would occur in the absence of a senior delivery call whenever the Department determined that such diversions were causing injury.⁴¹ The draft Water Management Rules also propose criteria for establishing rebuttable presumptions about the depletive effects of ground water withdrawals and about whether injury is occurring to a senior water right as a result of junior ground water withdrawals.

³⁹ *A & B Irrigation District v. Idaho Conservation League*, 131 Idaho 411, 958 P.2d 568 (1998).

⁴⁰ Working Draft Text for Negotiated Rulemaking by the Idaho Department of Water Resources, IDAPA Docket No. 37-0313-9701 (July 10, 2001).

⁴¹ Section 37.03.13.020.04.a of the draft rules provides:

[W]hen data gathered by the Department or otherwise submitted to the Department show to the satisfaction of the Director that the diversion of ground water under any water right, which is not included in a water district, causes injury to a senior priority surface water right or to a senior priority ground water right, such junior priority diversion shall be curtailed under the provisions of Section 42-237a.g., Idaho Code, unless approved mitigation is provided in accordance with Rule 20.13 of these rules.

PRELIMINARY MITIGATION PLAN

6. Establishment of the Thousand Springs GWMA.

On August 3, 2001, following another series of drought years, the Department issued an order designating the Thousand Springs GWMA.⁴² In that order, the Department stated its intent to curtail certain ground water diversions that it believed were causing significant depletions to hydraulically connected surface water sources within the TSR.⁴³ The order was based on the Department's conclusion that ground water withdrawals from the ESPA for irrigation and other consumptive purposes, which occur in proximity to the Thousand Springs area, cause reductions in spring flows tributary to the TSR within six months or less from the time the withdrawal occurs. The order also concluded that ground water diversions within five to ten kilometers from the canyon wall on the north side of the Snake River in the TSR result in seasonal spring flow reductions equal to fifty percent or more of the amount of water diverted and consumptively used, which the Department found to equal 40,000 AF. Finally, the order concluded that the designated area "may be approaching the conditions of a critical ground water area under Idaho Code 42-233a."⁴⁴ The Districts, among others, disputed these conclusions and actions.

Almost simultaneously with the Department's actions, North Side and Twin Falls Canal Companies and Clear Springs Foods requested that the Department designate Basin 36 as a GWMA. The Department treated these requests as formal petitions and noticed the matter for an administrative hearing. Certain ground water users filed responses to these petitions and thereby became parties to the administrative proceeding before the Department. Ground water users also brought suit against the Department in the Power County District Court seeking an order determining that the GWMA designations were improper and enjoining the Director from curtailing ground water diversions.⁴⁵

7. Interim Settlement Agreements.

Concurrent with the above developments, ground water users, the surface and spring water users, and the Department engaged in discussions aimed at reaching an interim settlement

⁴² The Department simultaneously issued an order designating the American Falls GWMA covering all or portions of basins 27, 29, 35 43 and 45, in the area of the ESPA above Milner Dam. *In the Matter of Designating the American Falls Ground Water Management Area*, Order (August 3, 2001).

⁴³ *In the Matter of Designating the Thousand Springs Ground Water Management Area*, Order (August 3, 2001). The Department's determination of the nature and extent of effects of ground water pumping on spring flows within the TSR was based on computer simulations using the Department's computer model of the ESPA that currently is being extensively refined and recalibrated.

⁴⁴ Idaho Code § 42-233a defines a critical ground water area as any ground water basin or designated part thereof, not having sufficient ground water to provide a reasonably safe supply for irrigation of cultivated lands, or other uses in the basin at the then current rates of withdrawal, or rates of withdrawal projected by consideration of valid and outstanding applications and permits.

⁴⁵ Petition for Judicial Review and Complaint for Preliminary Injunction, Writ of Prohibition, Writ of Mandate, and for Declaratory Relief, In the District Court of the Sixth Judicial District of the State of Idaho, In and For the County of Power (filed August 21, 2001)

PRELIMINARY MITIGATION PLAN

by which to avoid the threatened curtailment of ground water diversions serving thousands of acres of irrigated farm ground as well as municipal and commercial diversions.

On August 31, 2001, ground water users in Basin 36, represented by MVGWD and NSGWD, and certain surface and spring water users reached an agreement in principle that later was memorialized by a written interim settlement agreement aimed at avoiding the pending litigation and establishing a framework for conjunctive administration until a long-term agreement could be reached ("Interim Agreement").

The primary strategies under the Interim Agreement were to acquire "replacement water" to enhance reach gains in the TSR and/or to reduce the use of ground water for irrigation across the two Districts. Specifically, the Interim Agreement resulted in: 1) the withdrawal of the pending petitions to designate the Thousand Springs GWMA; 2) the voluntary dismissal without prejudice of the ground water users' complaint against the Department in the Power County District Court; 3) the agreement by NSGWD and MVGWD to acquire and provide up to 40,000 AF of "replacement water" via the North Side Canal to enhance reach gains in the TSR for the 2002 and 2003 irrigation seasons;⁴⁶ 4) the agreement by NSGWD and MVGWD to voluntarily reduce ground water diversions pro-rata (up to a maximum of ten percent) from a subsequently agreed upon baseline to the extent that replacement water was not provided in any year. See Appendix B.

8. Establishment of Water District 130.

The Department's position has been that it cannot directly administer ground and surface water rights until they have been decreed and then incorporated into a water district established pursuant to Chapter 6, Title 42 of the Idaho Code. As the Department has recommended water rights in various basins to the SRBA Court, it has requested that the Court authorize the "interim administration" of rights pursuant to its recommendations pending issuance of partial decrees. As recommended water rights subsequently have been decreed, the Department has begun incorporating them into water districts. In February 2002, the Department established Water District 130 to encompass adjudicated ground water rights in Basin 36 and 37.⁴⁷ The SRBA Court has issued two orders authorizing interim administration of water rights within Basins 36 and that portion of Basin 37 overlying the ESPA.

⁴⁶ Under the Interim Agreement, NSGWD agreed to provide up to twenty-five thousand AF of water and MVGWD agreed to provide up to fifteen thousand AF in both 2002 and 2003, or be subject to voluntary curtailments.

⁴⁷ *In the Matter of Creating the Thousand Springs Area Water District, Designated as Water District 130, for the Administration of Rights to the Use of Ground Water and Springs Discharging from the Eastern Snake Plain Aquifer in Administrative Basins 36 and 43*, Final Order Creating Water District 130 (Feb. 9, 2002). The Order was amended on January 8, 2003 to include a portion of Basin 37.

PRELIMINARY MITIGATION PLAN

With the establishment of Water District 130, the Department subsequently has withdrawn the GWMA designation for the Thousand Springs area.⁴⁸

D. Summary.

The above-described historical background places in context the complexities of the ESPA/Snake River hydrologic system, many of the numerous factors affecting it, and the difficulty in addressing specific “problems” by any planning mechanism. It also provides the backdrop and justification for the goals and objectives of the Plan described below.

III. Plan Goals, Objectives, and Strategies.

A. Plan Goals.

1. To mitigate material injury to senior water rights, if any, resulting from depletions to the TSR determined to be directly related to ground water withdrawals under junior priority rights of the Districts’ members.
2. To provide protection to the Districts’ members from a delivery call or other administrative action seeking to curtail ground water withdrawals to fill senior surface or spring water rights.
3. To obtain maximum participation from the community of ground and surface water users and administrators in developing and meeting Plan goals.
4. To provide certainty to water users.
5. To avoid costly and protracted litigation among water users.
6. To assure stable, long-term funding to meet Plan goals.
7. To learn how to better manage the interconnected ground, surface, and spring water resource.
8. To build trust among water user groups through their cooperative, full involvement in the process of managing the shared water resource.

⁴⁸ *In the Matter of Dissolving the Thousand Springs Ground Water Management Area Designation*, Final Order (August 29, 2003).

B. Plan Objectives.

1. Provide Replacement Water. The Districts will acquire and deliver an average of 40,000 AF of replacement water to the TSR during each of the five years of this Plan.
2. Improve Water Distribution. The Districts will cooperate with water users in the TSR, the Department and other relevant agencies, to identify and, where feasible and appropriate, implement opportunities to improve water distribution in the TSR through physical construction projects or institutional arrangements such as water user agreements, exchange agreements, and water master instructions.
3. Reduce Ground Water Withdrawals in Key Areas. The Districts will attempt to reduce ground water withdrawals in areas believed to be in close hydraulic proximity to spring discharge points within the TSR.
4. Develop Feasible/Effective Aquifer Recharge. The Districts, with the cooperation and assistance of the Department and other relevant agencies, will identify, and where feasible, develop aquifer recharge sites in areas that will optimize water accruals to the TSR.
5. Minimize Unusable Operational Spill. The Districts, in cooperation with North Side Canal Company, will identify and develop flood and operational spill control sites above the TSR to optimize accruals to the TSR and minimize instances when surface water is spilled over the canyon rim (such as during power outages, rain storms, and such other times when the presence of additional rented storage water makes management of the North Side Canal Company system difficult).
6. Establish Accounting System. The Districts, with the cooperation and assistance of the Department, will implement an integrated accounting system that will reasonably and equitably track credits and debits to the Districts' mitigation account.
7. Establish Monitoring Program. The Districts will cooperate with the Department and TSR water users in monitoring and documenting Plan performance and Plan effects, and in measuring and reporting all relevant discharges, diversions and uses of ground, surface and spring water.
8. Implement Adaptive Management. The Districts will implement an adaptive management approach to incorporate new information into the strategies described in this Plan so as to further the development of a long-range or permanent plan acceptable to water users and the Department. A

PRELIMINARY MITIGATION PLAN

key component of this process is the full involvement and cooperation of the water user community.

C. Plan Strategies.

1. Provide Replacement Water.

Subject to carryover shortages or excesses, which will be accounted for as debits and credits during the term of this Plan as described below, MVGWD will use best efforts to acquire and provide 15,000 AF of replacement water on average over the five years of this Plan, and NSGWD will use best efforts to acquire and provide 25,000 AF of replacement water on average over the five years of this plan to accrue to the TSR via the actions described below. Subject to delivery facility constraints, either or both of the Districts may acquire and provide more than the above allocations in any given year. To the extent water is directed to Plan actions the District(s) will be entitled to a carryover credit as described in the Accounting Strategies below. Circumstances beyond a District's control may prevent it from acquiring or delivering the above-stated targets in any given year. Subject to the contingencies and accounting outlined below, the Districts intend that the 40,000 AF per year target will be met on average over the five-year term.

To facilitate the delivery of replacement water, the Districts will, during the term of this Plan:

- a. Subject to replacement water availability and conveyance capacity of the North Side Canal Company system, continue to operate the Sandy property to provide storage for acquired replacement water. (NSGWD)
- b. Subject to replacement water availability, operate and maintain a 36-inch pipeline to deliver replacement water from the Sandy property tail-water remediation lake to serve approximately 1,600 irrigated acres below the canyon rim currently irrigated with spring water from the Curren Tunnel. (NSGWD)
- c. Provide technical or other cooperative assistance to the Weatherby Springs water users in their construction of an 18-inch pipeline to eliminate ditch losses on the Bar S Ditch. (NSGWD)
- d. Continue cooperation and communication with North Side Canal Company and American Falls Reservoir District No. 2 to facilitate their carrying of replacement water in their facilities and to identify ways to improve carriage or delivery of replacement water. (NSGWD and MVGWD)
- e. Encourage operation and further refinement of a global water bank in Water District 01 that provides adequate incentives for participation by storage spaceholders and certainty of year-to-year water availability at a reasonable price. (NSGWD and MVGWD)

PRELIMINARY MITIGATION PLAN

- f. Implement process to notify the Department and affected water users of, and involve them in, the Districts' annual implementation plans. (NSGWD and MVGWD). This procedure will include the following:
 - By July 30 of each year following Plan approval, prepare and distribute schedule or report of actual replacement water acquisition, other Plan strategies initiated or completed and anticipated performance of other Plan strategies for the year;
 - By December 15 of each year following Plan approval, or as soon thereafter as Water District 01 water accounting data becomes available, prepare and distribute accounting of actual replacement water provided and performance of other Plan strategies for the year.
 - By February 1 of each year following Plan approval, meet with the Department and affected water users to discuss management implications of prior Plan performance and any newly obtained facts or analysis.
- g. Implement a contingency curtailment plan ("Contingency Plan") if replacement water cannot be obtained. This Contingency Plan would be implemented as follows:
 - Provide for pre-enrollment by District members of irrigated acres and appurtenant water rights that they would be willing to idle during periods when a Contingency Plan is in effect, and stating the terms, if any, by which curtailment would occur (i.e., minimum payment, if any, acreage location, curtailment period and volume).
 - If during the Plan's five-year term the Districts' replacement water accounting has a deficit of 80,000 AF or more, the Districts will implement a Contingency Plan aimed at reducing the annual volume of ground water diversions by up to 40,000 AF when compared with the Base Year. The Base Year withdrawals for purposes of this Plan shall be the average of ground water withdrawals by the Districts' members in 1999 and 2000.⁴⁹

⁴⁹ The use of a Base Year average of ground water diversions for purposes of this Plan is intended only to provide an objective benchmark for quantifying Plan performance with respect to voluntary or Contingency Plan curtailments of ground water diversions. It is not to be construed in to limit or modify any element of the Districts' members' decreed water rights, including but not limited to diversion rate, diversion volume, season of use or place of use.

PRELIMINARY MITIGATION PLAN

- Funds that otherwise would have been expended to acquire replacement water during years when replacement water is unavailable will be held in District reserve accounts. Funds in reserve accounts will be used by the Districts first to rent excess or “make-up” replacement water in subsequent years if excess replacement water is available and can physically be diverted to Plan purposes at Milner Dam, or if the Districts’ replacement water accounting will have a deficit of 80,000 AF or more, then the reserve funds will be used in conjunction with any available state or federal funding to implement a voluntary buyout, or as a last resort where sufficient reductions to meet the Contingency Plan objective cannot be achieved on a voluntary basis, then, a mandatory curtailment/buyout.
 - If the Districts determine that a Contingency Plan must be implemented, it will notify the Department how they intend to do so.
- h. The Districts will pursue legislation and funding for local, state, or federal cost-sharing that will provide financial incentives for voluntary curtailment and enrollment of lands/water rights.

Replacement water may be in several forms, including but not limited to:

- Storage water or natural flow water rented by the Districts through state authorized water banks, or otherwise acquired on a willing buyer/seller or lessee/lessor basis and diverted to Plan purposes at Milner Dam;
- Natural flow water in excess of decreed rights available during high water periods and diverted to Plan purposes at Milner Dam;
- Substitute supplies from any source obtained by rental, purchase or exchange and made available by the Districts for direct diversion and use in the TSR;
- Non-diverted volumes of water resulting from ground water users voluntarily or otherwise curtailing ground water use either through withdrawal of land from all irrigation or conversion to lower consumptive use crops;
- Net accruals to the aquifer resulting from conversion of ground water irrigated acres within the Districts to surface water supply;
- Ground water recharge benefits attributable to District actions or obtained through contracts with ground water recharge districts;

PRELIMINARY MITIGATION PLAN

- Tail-water, operational spill or other water available for, and used by, the Districts to implement this Plan; or
- Additional water made available to water users in the TSR through the Districts' assistance or effort to improve water delivery or use efficiencies below the canyon rim within the TSR.

2. Improve Water Distribution.

The Districts will cooperate with water delivery entities, including canal companies, Water Districts 130 and 36A, and with individual water users to identify key areas where water collection or distribution within the TSR may be improved to optimize availability of spring discharges to senior water right holders who may not be receiving water in sufficient quantity to reasonably meet their authorized beneficial use. The level of the Districts' participation in such projects will be in the Districts' discretion and limited to projects with technical merit providing water to senior priority water rights with demonstrated material injury. Where junior spring rights would derive direct or incidental benefits from such projects their participation also would be expected.

3. Reduce Ground Water Withdrawals.⁵⁰

- a. Each District will establish a system by which its respective members may voluntarily curtail ground water diversions on their lands in any year during the term of this Plan and contribute the annual volume of curtailed water use toward meeting Plan goals and objectives. The land/water right enrollment program established to implement the Contingency Plan described above also may serve to identify lands and water rights that may be idled to provide replacement water in any given year regardless of the status of the Districts' replacement water account.
- b. The Districts will continue to facilitate the conversion of ground water-irrigated acres within NSGWD to acres using surface water as the primary source of supply where such conversion is economically feasible. NSGWD will assist members to develop, improve or reinstate access to surface water delivery systems. For at least the term of this Plan, the Districts will pay the cost to acquire the surface water for the converted acres, together with any wheeling charges that may be associated with delivering surface water through canal company facilities.

⁵⁰ Providing replacement water as a substitute supply to ground water irrigated acres in furtherance of this Plan is expressly not an abandonment, forfeiture, or change by the Districts' members of any element of their ground water rights. Nor is providing replacement water to these lands intended to change the nature of the appurtenant ground water rights to a supplemental supply. The Districts request an express conclusion in any order approving this Preliminary Plan that non-use of any ground water right in furtherance of this Plan is not an abandonment, forfeiture or change of the right.

4. Develop Feasible/Effective Aquifer Recharge.

- a. NSGWD proposes to operate and maintain at least six flood control sites above the Curren Tunnel and other key springs. Flood control ponds will be operated to capture and retain excess surface water that otherwise may spill to the Snake River.
- b. The Districts will evaluate cooperative or contractual agreements with existing or future ground water recharge districts or projects.

5. Minimize Unusable Operational Spill.

In addition to operating the flood control sites described above, the Districts will cooperate with canal companies to investigate opportunities to optimize incidental recharge from canal seepage and from on-farm water application.

6. Establish Accounting System.

The Districts, in cooperation with the Department, will establish an accounting system to accurately record and document the quantities of replacement water credited to the Districts from implementation of the strategies described above. This accounting system will address:

- Credits for surface water acquired and diverted at Milner Dam or delivered to project facilities or to the TSR;
- Credits for voluntary curtailments of ground water uses by District members or curtailments pursuant to any Contingency Plan implementation;
- Credits for aquifer recharge provided by the Districts, directly, contractually or incidentally;
- Credits for water provided via transfers, exchanges, substitute supplies or other agreements;
- Total replacement water credit provided from all sources;
- Carryover of any excess credits or debits;
- Allocation of transient and steady state impacts of mitigation actions over the term of the Plan; and
- Any other issues the Districts deem appropriate as an item of accounting.

7. Monitoring.

Reliable and systematic measurement and reporting of surface, spring and ground water diverted volumes, diversions and uses are essential to proper administration of water rights under the prior appropriation doctrine and Idaho law. The Districts propose the following monitoring actions:

- a. The Districts, through their District Hydrographers, will continue to measure and report ground water withdrawals within their boundaries at the current level of intensity. (MVGWD and NSGWD)
- b. The Districts, through their District Hydrographers, will cooperate with the Water District 130 Watermaster to identify unauthorized uses of ground water within their respective jurisdictions. (MVGWD and NSGWD)
- c. The Districts will cooperate with the Water District 130 Watermaster to measure and report all replacement water diverted at Milner, together with a breakdown of volumes delivered to converted acres, recharge and other projects operated under this Plan. (MVGWD, NSGWD and WD130)
- d. Accurate measurement and reporting of spring discharges and water delivery and use in Water District 36A and the TSR will require construction or improvement of water flow measurement and control structures at some spring discharge points and headgates. Accurate measuring and reporting also will require additional funding for Department personnel and services and measuring devices to carry out the measurement and reporting program in Water District 36A and the TSR that will be necessary to properly administer rights, assess potential injury to senior water rights and assess the effects of implementing this Plan. This measurement and reporting must include the following:
 - i. Comprehensive and accurate compilation of the location of point of diversion and place of use, source, diversion rate, allowable diversion volume, priority date and method of use (i.e., primary right, supplemental, subordinate, or reuse) of all TSR rights (Department);
 - ii. Comprehensive and accurate measurement and reporting of discharge from all springs that are the source for permitted water rights (Department and WD36-A);
 - iii. Comprehensive and accurate measurement and reporting of all diversions from springs or spring-fed streams, such that diversions can be attributed to specific water rights (Department and WD36-A);

PRELIMINARY MITIGATION PLAN

- iv. Regular and systematic reporting of flow, diversion and beneficial use records (Department and WD36-A).
- e. The Districts, in cooperation with the Department and affected spring and surface water users, will use the above-described measurements, the records generated in the accounting previously described, and records or other data collected by the Department, the Watermaster for Water Districts 130 and 36A and other TSR water users to: (1) perform the technical data analyses necessary to ascertain the relationships between Plan actions and spring discharges and diversions in the TSR; and (2) evaluate potential injury to senior spring and surface water rights that may be resulting from ground water withdrawals under junior rights.
- f. The Districts will support the Department and water users within the TSR in obtaining permanent funding for one additional full-time Department employee to permit sufficient measurement and reporting of TSR water flows, deliveries and uses described above.
- g. The Districts will support the Department and water users within the TSR in obtaining financial assistance to purchase, install or improve accurate water measuring and recording devices to generate the spring flow, water diversion and water use data.
- h. The Districts will cooperate with the Department to evaluate whether measurements from existing monitoring wells within five kilometers of the TSR may provide information useful to evaluating the effects of Plan actions.

8. Incorporate Adaptive Management.

Adaptive management is a process for continually improving management policies and actions by learning from their outcomes. This Plan has been developed to incorporate each of the six steps of an adaptive management process: (1) problem assessment; (2) plan design; (3) plan implementation; (4) monitoring; (5) evaluation; and (6) plan adjustment. This process has been used successfully by natural resource and other managers since the 1970s, and is especially applicable to managing complex systems like the ESPA/TSR.

Adaptive management allows policy makers and managers to find better ways to meet goals, identify key gaps in understanding, gain reliable feedback about the effectiveness of alternative practices and to foster participation of the whole community of interested parties.

a. Problem Assessment.

The problem assessment phase defines the scope of actions intended to provide solutions. The scope of actions proposed by the Districts is limited to providing replacement water in amounts and at appropriate times and locations to provide to the TSR the quantity of water that

PRELIMINARY MITIGATION PLAN

the Department determined in August 2001 would be generated within six months by curtailing pumping from wells within the Thousand Springs GWMA junior to June 1, 1967. The proposed actions are not intended to offset the effects of drought, or the effects of over one hundred years of surface water management on spring discharges.

b. Plan Design.

This Plan builds on the actions contained in the Interim Agreement under which the Districts have operated under for the years 2002 and 2003. As discussed above, the Interim Agreement was a negotiated agreement among water users who recognized, among other things, the need to begin taking steps to address the effects of ground water withdrawals on the TSR and the financial and technical limitations facing the Districts, spring users and the Department. The actions proposed in this Plan are within the financial ability of the Districts to carry out. The actions also reflect the Districts' good faith intent to follow through with certain longer-term actions agreed to in the Interim Agreement until better information becomes available.

The Plan relies heavily on cooperative monitoring and reporting actions by the Department and water users in the TSR. The monitoring proposed is intended to maximize the development of useful and needed information at the least cost. It also proposes evaluation of additional or different monitoring that may improve understanding.

The Districts believe this Plan design can be used to fill in gaps in understanding and to improve the Plan.

c. Plan Implementation.

The Districts will initiate and continue the actions in this Plan once approved over its five-year term unless it is determined in the meantime that they are unnecessary, not cost effective, ineffective or having adverse effects on meeting Plan goals.

Full Plan implementation is contingent on the continuing availability of replacement water, particularly storage water from the Snake River Basin above Milner Dam, at a reasonable price. It also is contingent on the continuing ability to use transmission and delivery facilities of the North Side Canal Company and American Falls Reservoir District No. 2, and the active cooperation of the Department and water users in the TSR in accurately measuring and reporting spring discharges and water deliveries and use. Finally, the Districts' ability to implement this Plan is contingent on legislative and other support for necessary funding and perhaps new legislation. The Districts may not be physically able to deliver 40,000 AF of replacement water to the TSR in the early years of Plan implementation due to physical constraints such as canal delivery capacities or lack of facilities or converted acres to accept all 40,000 AF. The Districts intend to meet the 40,000 AF annual objective on average over the five years of the Plan and have adopted a Contingency Plan. This approach is consistent with the Conjunctive Management Rules, including their provision for phased-in administration where, as here, the

PRELIMINARY MITIGATION PLAN

hydrologic connection between rights may be remote, the resource is large and no direct, immediate relief would be achieved if the junior-priority water use were discontinued.⁵¹

The Districts will be unable to implement the actions contained in this Plan if the Districts simultaneously are required to litigate its merits or defend against a delivery call from the TSR or elsewhere.

d. Plan Monitoring.

The Districts intend that the proposed monitoring of water levels, availability, diversions and use will provide necessary information to be used by the Districts, the Department and TSR water users to evaluate whether Plan objectives and goals are being or will be met. The information obtained through monitoring also will be used to test the hypothesized relationships between the ESPA and the TSR that formed the basis for the proposed actions and the expected results. The recalibrated ground water model will provide an important tool to incorporate monitoring data into conjunctive management.

The Districts intend that the Department will be responsible for storing and managing monitoring data and providing access to it by the Districts and interested parties.

e. Evaluation.

This step involves comparing actual outcomes to intended outcomes and interpreting the reasons underlying any differences.

The information obtained by monitoring and by the cooperative information exchange among ground, surface and spring water users should be made accessible to all interested parties. Further, the Districts, interested parties and the Department should use this information to develop analyses, including computer modeling analyses, that improve understanding about ESPA/TSR interrelationships and will lead to a long-range water management program.

The Districts will ensure results of Plan implementation, monitoring and evaluation are fairly and accurately documented and communicated to interested parties.

The Districts will cooperate with the Department and other interested parties to design and prioritize ground water modeling scenarios to address immediate conjunctive management concerns.

f. Plan Adjustment.

The Districts will cooperate with the Department and other water users to identify where uncertainties about ESPA/TSR interrelationships and about effects of Plan implementation have

⁵¹ IDAPA 37.03.11.020.04.

PRELIMINARY MITIGATION PLAN

been reduced, and where they remain unresolved. This process may lead to reevaluation of Plan objectives and strategies. Additional or different strategies may be proposed and implemented.

Within six months of the expiration of this Plan, the Districts intend to submit an application to the Department requesting continued approval of this Plan or approval of an amended or substitute Plan. A subsequent plan would incorporate new information and understanding gained through implementing this Plan, and hopefully will document an agreement by affected water users on a long-term management and administration approach for Water Districts 130 and 36A and the TSR.

Adjustments to this Plan may occur throughout its five-year term. Absent significant changes in understanding or other compelling reasons, however, the Districts intend that significant adjustments will be reserved until the Plan is reevaluated near the end of the five-year term.⁵² There are several reasons for this.

First and foremost, absent a genuine understanding concerning whether, to what extent and where actual material injury to senior-priority water rights may be occurring in the TSR, and absent reliable measuring and reporting of actual water requirements and deliveries in the TSR, the Districts cannot voluntarily assume greater obligations than are included in this Plan. The Department's Conjunctive Management Rules set forth numerous relevant criteria concerning whether the holders of senior water rights are suffering material injury.⁵³ The purpose of these criteria is to ensure that any action as significant as curtailing water diversions serving hundreds of thousands of acres of Idaho agricultural lands, municipalities and industries is based on a

⁵² What may constitute a "significant change in understanding" or a "compelling reason" should be a matter for discussion among the Districts, affected water users, and the Department, it may incorporate peer review of any supporting scientific analysis, and would be focused on mitigating demonstrated material injury to senior rights in the TSR.

⁵³ Under IDAPA 37.3.01.042, Factors the Director may consider include, but are not limited to:

The amount of water available in the source from which the water right is diverted;

The effort or expense of the holder of the water right to divert from the source;

Whether the exercise of junior-priority rights individually or collectively affects the quantity and timing of when water is available to, and the cost of exercising, a senior-priority water right;

If for irrigation, the rate of diversion compared to the acreage of land served, the annual volume of water diverted, the system diversion and conveyance efficiency and the method of irrigation application;

The amount of water diverted and used compared to the water right;

The existence of water measuring and recording devices;

The extent to which the requirements of the holder of a senior-priority water right could be met with the user's existing facilities and water supplies by employing reasonable diversion and conveyance efficiency and conservation practices; and

The extent to which the requirements of the senior-priority surface water right could be met using alternate reasonable means of diversion or alternate points of diversion, including construction of wells or the use of existing wells to divert and use water from the area having a common ground water supply.

PRELIMINARY MITIGATION PLAN

Careful consideration of the actual diversion practices and uses under the senior water rights who might benefit.

Second, there is significant uncertainty about the interrelationships between the ESPA/TSR and the likely effects of some of the actions proposed in this Plan. This uncertainty, coupled with the likelihood that the effects of certain of the proposed actions will not be fully manifest even within the five-year term, or may be masked by confounding factors not under the Districts' control, warrants a conservative approach to Plan adjustments.

Third, the actions proposed in this Plan reflect the upper limit of what the Districts reasonably can finance and implement over the next five years.

Adjustments that might be implicated during this Plan's five-year term that involve actions above and beyond what is proposed here could be incorporated into this Plan, but they would need to be undertaken with the financial participation of the parties who would be benefited. The Districts encourage that process and participation.

IV. CONCLUSION.

The peak discharges in TSR springs that occurred in the early 1950s were artificially high discharges induced by many years of incidental recharge caused by surface water diversions onto the Eastern Snake Plain. The decline in spring discharges in the TSR that began in approximately 1953 was the result of many factors. While ground water development for municipal, industrial, agricultural and domestic uses has contributed to the decline, other factors over which the Districts have little or no control have played, and presumably will play, a larger role. Unless cooperative steps are taken by the State of Idaho, affected water users and others on a larger scale than can be accomplished by the Districts under this Plan or any other plan, the declining trends in reach gains to the TSR should not be expected to change significantly in the future.

This Plan represents the Districts' commitment to work with the Department and TSR water users to find reasonable, feasible solutions to the water management issues facing water users on the Eastern Snake Plain and in the TSR. It also describes the Districts' good faith efforts to carry forward with actions they already have begun under the Interim Agreement, and that are aimed at improving ground and spring water conditions. The Plan's primary strategy is to provide an average of 40,000 AF of replacement water to the TSR over the Plan's five-year term.

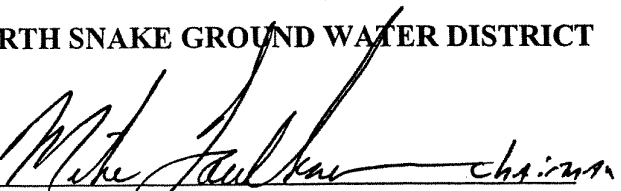
This Plan is an "action-forcing" document. It sets out specific positive steps that will be undertaken by the Districts to further eight equally important goals. To be meaningful or successful, the Plan also requires action by the Department and water users in the TSR. Plan adjustments during the five-year term will be contingent on this cooperative action and on the development of better information for management. Plan Adjustments will be tied to providing mitigation for demonstrated material injury to senior water rights in the TSR consistent with the Department's Conjunctive Management Rules.

PRELIMINARY MITIGATION PLAN

Adopted October 9, 2003.

NORTH SNAKE GROUND WATER DISTRICT

By:

 *Chairman*

Mike Faulkner, Chairman of the Board

PRELIMINARY MITIGATION PLAN

Adopted October 9, 2003.

MAGIC VALLEY GROUND WATER DISTRICT

By: Orlo H. Maughan
Orlo H. Maughan, Chair

INDEX TO APPENDICES

- Appendix A: Location Map of Ground Water Districts, Water District 130 and the Thousand Springs Reach
- Appendix B: Interim Stipulated Agreement for Areas Within and Near IDWR Administrative Basin 36
- Appendix C: Idaho Department of Water Resources, *Preliminary Report - Average Annual Spring Discharge to Snake River Between Milner and King Hill (1902-2003)*

APPENDIX A

Location Map Ground Water Districts and the Thousand Springs Reach

Water District No. 130

King Hill

Snake R.

North Snake
Ground Water District

Magic Valley
Ground Water District

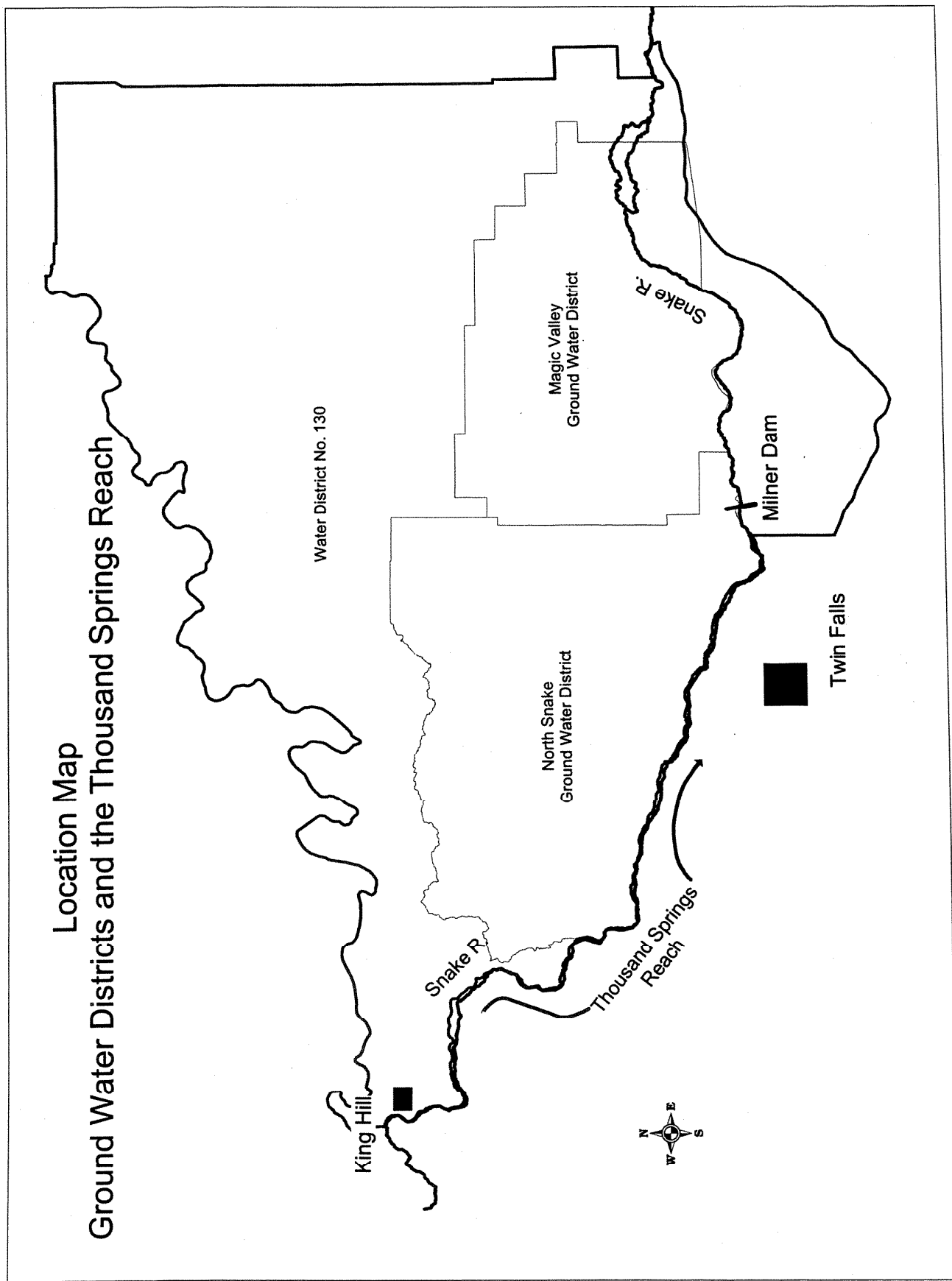
Thousand Springs
Reach



Snake R.

Milner Dam

Twin Falls



APPENDIX B

**INTERIM STIPULATED AGREEMENT
FOR AREAS WITHIN AND NEAR IDWR ADMINISTRATIVE BASIN 36**

This Interim Stipulated Agreement (Agreement) is entered into between the undersigned ground water users and surface water users, or their representatives, in consideration of the promises stated in this Agreement. The term of the Agreement shall extend until to December 31, 2003.

1. This Agreement is made in reference to the following facts:
 - 1.1 The Director of the Idaho Department of Water Resources (Director) stated his intent to entirely curtail diversions under certain water rights for ground water beneath portions of Basin 36, an administrative sub-basin. The Director's intent was based upon his findings, set forth in his administrative order designating the Thousand Springs Ground Water Management Area dated August 3, 2001, that diversions of ground water under such rights cause significant reductions in spring flows tributary to the Thousand Springs reach of the Snake River, and that those reductions will further reduce the diminished water supply available to satisfy senior priority surface water rights during current drought conditions.
 - 1.2 The parties are unable to agree to the extent of interconnection of ground water and surface water sources in the Snake River Basin and any alleged injury to surface water rights as a result of the diversion of water from the Eastern Snake Plain Aquifer (ESPA);
 - 1.3 The Idaho Department of Water Resources (IDWR) has committed to complete reformulating and recalibrating the ESPA Ground Water Model by December 31, 2003, contingent on continued funding from the Idaho Legislature and other entities;
 - 1.4 The new ESPA Ground Water Model is expected to provide the parties with additional information regarding the alleged impacts of ground water diversions from the ESPA on spring discharges and flows in defined reaches of the Snake River; and
 - 1.5 The parties desire to avoid the need for litigation at this time on the nature and extent of the alleged injury to senior priority surface water rights caused by diversions of ground water or surface water under junior priority water rights within Basin 36 pending the completion of the new ESPA Ground Water Model. The parties understand that this agreement and IDWR administrative actions described in this agreement may include water rights in areas immediately adjacent to Basin 36 as necessary to respect geohydrologic characteristics and water user organization boundaries. All subsequent references to Basin 36 in the agreement include this qualification.

2. Interim Stipulated Agreement:

- 2.1 Upon the payment of necessary advances by North Snake Ground Water District (NSGWD) and Magic Valley Ground Water District (MVGWD), Northside Canal Company (NSCC), shall apply annually in 2002 and 2003 for up to 40,000 acre feet of water from rental pools above Milner for diversion into the NSCC canal at such times and in such manner as NSCC agrees. NSGWD agrees to pay the necessary advances for up to 25,000 acre feet of water, and MVGWD agrees to pay the necessary advances for up to 15,000 acre feet of water. The separate obligations of NSGWD and MVGWD to pay for storage shall be based upon their proportionate share as described above. The obligation of NSGWD and MVGWD to provide 40,000 acre feet of water will be reduced by any other water provided pursuant to this or any other interim stipulated agreement for replacement water in Basin 36 through the NSCC system by entities other than the NSGWD and MVGWD.
- 2.2 The replacement water will be used to enhance the spring flows in the Thousand Springs reach by 40,000 A.F. The NSGWD members will, to the maximum extent possible, use storage water or canal company shares delivered through the Northside Canal and use Northside Canal Company waste water in lieu of pumping ground water. To the extent that the full 40,000 A.F. is not used for irrigation in lieu of groundwater pumping, the unused portion of the 40,000 A.F. will be used to enhance the spring flows in the Thousand Springs reach. Periodic reports will be prepared describing how the replacement water has been used pursuant to this Agreement.
- 2.3 NSCC agrees to rebate any monies provided by ground water users that are not used to acquire storage water required by paragraph 2.1.
- 2.4 Those parties providing replacement water agree to equitably apportion any costs associated with delivery of the water provided pursuant to paragraph 2.1. NSCC agrees to forego conveyancing costs for delivery of such water provided NSGWD uses its best efforts to use the water identified in paragraph 2.5.3. NSCC agrees to use its best efforts to minimize any other costs associated with the delivery of such water.
- 2.5 Those parties providing replacement water agree to, in good faith, explore the feasibility, funding and implementation of the following measures:
- .1 NSGWD members who are shareholders in NSCC will make best efforts to use their NSCC shares on appurtenant lands before using ground water, unless the NSCC water is not available.
 - .2 NSGWD members within the NSCC service area will make best efforts to use the storage water described in paragraph 2.1 in lieu of pumping a similar amount of ground water. (Use existing NSCC headgates.)

- .3 NSGWD members who are also NSCC shareholders within the NSCC service area will make best efforts to use water pumped from NSCC sediment ponds and other waste water in lieu of ground water.
 - .4 NSGWD will make periodic reports describing the actions being investigated and undertaken pursuant to paragraph .
- 2.6 NSGWD and Buckeye agree to use their best efforts to provide twelve (12) CFS of water to Buckeye from Riley Creek by the 2002 irrigation season as contemplated in the July 2001 letter to NSGWD.
- 2.7 The following provision will apply during the irrigation season in any year in which the following conditions occur, unless otherwise agreed by the parties: If by April 1 in any year none of the 40,000 acre feet of water identified in paragraph 2.1 is provided either by this agreement or by other replacement water, the undersigned holders of ground water rights agree that their diversion and use of ground water irrigation water rights will be ten (10) percent less than their base of ground water irrigation use, based on power and fuel consumption records, or other basis acceptable to the Director. If by April 1, some but not all of the 40,000 acre feet identified in paragraph 2.1 is provided (by this agreement and/or other replacement water) an adjustment to ground water reductions shall be made in proportion to the percentage of the 40,000 acre feet provided. In lieu of individual reductions, ground water districts may achieve reductions on a district wide basis. The parties agree to meet and establish a procedure for determining the base upon which any reductions in ground water use will be determined.
- 2.8 Safe Harbor: In exchange for the commitments enumerated in paragraphs 2.1 through 2.7 the undersigned holders of senior priority surface water rights and their representatives agree not to seek either judicially or administratively the curtailment or reduction, other than as provided in paragraph 2.7, of any junior water rights held by or represented by the undersigned within Basin 36 for the term of this agreement.
- 2.9 By providing replacement water or, in the alternative, agreeing to a reduction in ground water irrigation diversions and use, the undersigned holders of ground water rights and their representatives do not concede that diversions of ground water are causing injury to senior priority surface water rights, nor do the undersigned holders of senior priority surface water rights and their representatives concede that the amount of replacement water accepted under this stipulated agreement compensates for the extent of the injury they allege.
- 2.10 The parties agree not to oppose the State of Idaho's motion to the District Court for the Snake River Basin Adjudication requesting authority for the Director to implement interim administration of water rights in Basin 36. The parties understand that interim administration will include: (1) enforcement of the provisions of the stipulated agreement; (2) curtailment of illegal diversions (i.e.

any diversion without a water right or in excess of the elements of a water right); (3) measurement and reporting of diversions of water rights; and (4) curtailment of out-of-priority diversions found by the Director to be causing injury to senior water rights that are not covered by a stipulated agreement or a mitigation plan approved by the Director. The parties reserve the right to file motions to participate or submit other pleadings to participate in proceedings on the motion as they deem appropriate.

- 2.11 The parties agree to work collaboratively with the Director to expeditiously create a water district or water districts and to formulate initial instructions to the associated watermaster(s) to administer water rights of the water district or water districts. Such instructions shall include the elements of administration identified in paragraph 2.10. The parties agree not to oppose the Director's initial instructions to these watermaster(s) that are jointly developed through this collaborative process.
- 2.12 The parties understand that the Director will issue an administrative order approving this Agreement, which will include the elements of interim administration identified in paragraph 2.10. Holders of water rights within the area subject to interim administration under this agreement who are not party to this or another stipulated agreement, either directly or as a member of a party to this Agreement, shall not be entitled to the benefits of the safe harbor provided by paragraph 2.8. The parties agree to request that the Director notify water right holders in Basin 36 who are not party to this or another stipulated agreement, that they may be subject to curtailment under the prior appropriation doctrine as established by Idaho law.
- 2.13 Other junior water right holders not members of NSGWD or MVGWD who desire the safe harbor protections of this agreement may join this agreement upon agreeing to pay a proportionate share of the costs and to be bound by all other terms of this agreement.

3. Process for Future Conflicts:

- 3.1 The undersigned parties agree to develop a process for ascertaining the extent of any injury caused by ground water diversions in the Basins under junior priority water rights to senior priority surface water rights, for sharing of information and for the development of any mitigation plans subsequently required.
- 3.2 For the term of this Agreement, the parties agree to use their best efforts to ensure completion of the reformulation and recalibration of the ESPA Ground Water Model and to continue discussions regarding a long-term agreement, including:
 - .1 The ESPA Model capabilities.

- .2 Adoption of statewide water management rules to govern IDWR's overall administration of water rights from surface and ground water sources.
- .3 Formalization of administrative structure for and administration of connected ground water and surface water uses in accordance with the prior appropriation doctrine.
- .4 Adoption of conjunctive administration rules based on the results from the new ESPA ground water model and other necessary information to more specifically govern IDWR's administration of water rights from connected sources of surface and ground water within the ESPA.
- .5 Consideration of a mechanism to account for changes in the use of water rights since the commencement of the SRBA and development of a means to administer water rights in the context of such changes.

4. Enforcement:

- 4.1 The parties understand the Director intends to approve this stipulated agreement in lieu of issuing curtailment orders under Idaho Code § 42-233b, and that in the event this Agreement is breached, any party may petition the Director, or the Director on his own initiative, may seek an appropriate remedy.
- 4.2 Upon the SRBA District Court issuing an order for interim administration of water rights within Basin 36 and related areas, this Agreement will be enforced through such administration.

5. Disclaimers:

- 5.1 This Agreement represents a settlement of disputed issues regarding the administration of water rights from interconnected ground water sources and surface water sources within portions of the Snake River Basin. The undersigned are unable to agree on the extent and locations of interconnections of ground water and surface water sources in the Snake River Basin along the reach of the Snake River along and above the Thousand Springs reach of the Snake River and the extent of injury, if any, to senior priority surface water rights as a result of ground water diversions from the ESPA under junior priority water rights. In order to avoid litigation of these issues at this time, the undersigned have entered into this Agreement. Because this Agreement does not fully resolve the issues, the parties agree that this Agreement shall not be construed or interpreted so as to waive or prejudice any contention by any party regarding the legal or factual relationship between water rights from surface and ground water sources in the Snake River Basin along and above the Thousand Springs reach of the Snake River.

- 5.2 This Agreement has been reached as the result of good faith negotiations for the purpose of resolving legal disputes, including pending litigation, and all parties agree that no offers and/or compromises made in the course thereof shall be construed as admissions against interest or be used in any legal proceedings.
6. Dismissal or Stay of Pending Actions:
- 6.1 Based upon the foregoing and the parties' understanding that the Director will stay further administrative proceedings regarding his Order In The Matter of Designating the Thousand Springs Ground Water Management Area, and unless this Agreement is breached, the parties agree as follows:
- 6.2 The Idaho Ground Water Appropriators, Inc., and other plaintiffs agree to secure voluntary dismissal, without prejudice, of their Petition for Judicial Review and Complaint for Preliminary Injunction, Writ of Mandate, and for Declaratory Relief that they previously filed in the Sixth Judicial District Court.
- 6.3 Representatives of the holders of surface water rights agree to withdraw their July 2001 petitions seeking the establishment of ground water management areas, and the holders of ground water rights agree to withdraw their pleadings filed in response to the same.
7. General Provisions:
- 7.1 The provisions of this Agreement are not severable.
- 7.2 This Agreement shall bind and inure to the benefit of the respective successors of the parties.
- 7.3 This Agreement sets forth all the covenants, promises, provisions, agreements, conditions, and understandings between the parties and there are no covenants, provisions, promises, agreements, conditions, or understandings, either oral or written between them other than are herein set forth.
- 7.4 Headings appearing in this Agreement are inserted for convenience and reference and shall not be construed as interpretations of the text.
- 7.5 This Agreement is executed in triplicate. Each of the three (3) Agreements with an original signature of each party shall be an original.
- 7.6 This Agreement shall be effective from October 11, 2001.
- 7.7 The parties to this Agreement may extend the term of this Agreement beyond 2003 by mutual consent on an annual basis.

The parties have executed this Agreement the date following their respective signatures.

APPENDIX C

AVERAGE ANNUAL SPRING DISCHARGE TO SNAKE RIVER BETWEEN MILNER AND KING HILL

1902-2003

